STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DEONTAE TERRELL BAKER, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

DEONTAE TERRELL BAKER,

Respondent-Appellant.

UNPUBLISHED
December 13, 2011

No. 299305
Wayne Circuit Court
Family Division
LC No. 08-483136

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, respondent was adjudicated responsible for armed robbery, MCL 750.529, and possession or use of a BB handgun by a person under 18 years of age, MCL 752.891. The trial judge ordered that respondent be placed with the Michigan Department of Human Services for care and supervision. We affirm.

Respondent first contends that his counsel was ineffective for failing to file pretrial motions challenging the validity of respondent's arrest. We disagree.

Because there was no evidentiary hearing on these issues in the trial court, our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To succeed on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's error, the outcome of the adjudication would have been different. *People v Lewis (On Remand)*, 287 Mich App 356, 364; 788 NW2d 461 (2010).

To prevail on his claim, respondent must demonstrate that a reasonable defense counsel would have challenged the warrantless arrest. A police officer may make a warrantless arrest if there is probable cause to believe that a crime has been committed and that the defendant

committed it. MCL 764.15; *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "'Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony.'" *People v Richardson*, 204 Mich App 71, 79; 514 NW2d 503 (1994), quoting *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991).

The record in this case indicates that there was probable cause to arrest respondent without a warrant. The police received a report of an armed robbery. Officers responded to a location near the alleged robbery and met with the complainant. The complainant told the responding officers that two assailants robbed her, that one of the assailants was wearing a red hoodie, black pea coat, black pants, and red bandanna, and that the other assailant was wearing a black hoodie, black pea coat, and black pants. The responding officers conveyed this information to other officers. Not long after the alleged robbery, the arresting officers saw two male individuals fitting the description of the assailants walking approximately a quarter mile from the location of the robbery. One of the officers saw the co-respondent drop what appeared to be a wallet. The officers thereafter arrested both respondent and the co-respondent.

On the basis of these facts, a fair-minded person of average intelligence would be justified in believing that respondent had committed armed robbery. See *Richardson*, 204 Mich App at 79. Therefore, the officers had probable cause to arrest respondent. See *id.* Because there was probable cause for the arrest, defense counsel cannot be deemed ineffective for the lack of a challenge to the legality of the arrest. See *Lewis*, 287 Mich App at 364. Moreover, given that any such challenge would have failed, respondent cannot show that the outcome of the adjudication would have been different if counsel had challenged the arrest. See *id.*

Respondent also argues that his counsel was ineffective for failure to move to suppress respondent's statements to the police, on the ground that the police interrogated him in custody without providing *Miranda*[1] warnings. *Miranda* warnings are required when an individual is subject to custodial interrogation. See *People v Roberts*, ___ Mich App___; ___ NW2d ___ (Docket No. 294212, May 11, 2011) slip op at 6. However, there is a "public safety" exception to the *Miranda* rule. *People v Attebury*, 463 Mich 662, 672; 624 NW2d 912 (2001). The public safety exception allows police to ask an individual about weapons without giving *Miranda* warnings, if the inquiry involves "an objectively reasonable question necessary to protect the police or the public from an immediate danger." *Id*. at 671-672.

The public safety exception applies to the case at bar. The arresting officers had information that the assailants used a weapon in the robbery. Upon performing patdown searches of respondent and co-respondent, the officers found no weapons. After taking respondent into custody at the scene, one of the officers asked respondent what he had been doing and asked about weapons, specifically, the location of the gun. The officer testified that respondent said, "it was only a BB gun; it's in the field," and pointed toward a field. The officer found a BB handgun in the field. The officer then recovered a second BB handgun from a sidewalk nearby. The officer testified that respondent said that one was his. Even if the officer's

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

original, general question to respondent was not necessary to protect the officer from immediate danger, the question concerning the location of the gun was legitimately related to neutralizing the danger of a weapon. Respondent's first statement regarding the location of the gun was in response to the officer's legitimate question; respondent's second statement regarding the ownership of the gun was volunteered. Both statements were thus admissible. *Attebury*, 463 Mich at 674 (response admissible under public safety exception); *Roberts*, slip op p 7 (volunteered response is admissible).

Because respondent's statements were admissible, trial counsel cannot be deemed ineffective for a lack of objection to the admissibility of respondent's statements. See *Lewis*, 287 Mich App at 364. Accordingly, respondent was not denied effective assistance of counsel.

Respondent next contends that the evidence was insufficient to support his armed robbery adjudication. Specifically, he argues that there was insufficient evidence to establish the identification element of armed robbery. We disagree.

Challenges to the sufficiency of the evidence in a bench trial are reviewed de novo. *People v Lanzo Construction Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). This Court must determine, in viewing the evidence in the light most favorable to the prosecution, whether the trial court could have found the elements of the crime were proven beyond a reasonable doubt. *Id.* at 474. "'Identity is an element of every offense.'" *Lewis*, 287 Mich App at 365, quoting *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "Identity may be shown by either direct testimony or circumstantial evidence . . . ." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

The identity evidence in this case was sufficient to convict respondent of armed robbery. The arresting officers testified that they saw two individuals, including respondent, fitting the description of the robbers, walking not far from the vicinity of the robbery shortly after it occurred. Moreover, one of the officers saw co-respondent drop what appeared to be a wallet. There was no direct evidence that this wallet belonged to the victim. However, the next day, officers called the victim and told her that they retrieved her wallet. The victim's wallet was returned to her about a week later.

Furthermore, one of the officers found a red bandanna in respondent's pocket. Although the victim's description included only one red bandanna—which co-respondent was apparently wearing when he was arrested—that respondent also had a red bandanna supports a finding that he was involved in the armed robbery. In sum, the evidence was sufficient for a trier of fact to conclude beyond a reasonable doubt that respondent was one of the assailants.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio